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ARKANSAS COURT OF APPEALS

DIVISION II
No. CV-17-1075

	Opinion Delivered September 12, 2018
JENNIFER WEBSTER APPELLANT	APPEAL FROM THE BENTON COUNTY CIRCUIT COURT [NO. 04DR-15-1464]
V.	
SHONN JONES APPELLEE	HONORABLE JOHN R. SCOTT, JUDGE
	REVERSED AND REMANDED

BRANDON J. HARRISON, Judge

Jennifer Webster (formerly Jones) appeals the circuit court's modification of visitation. She argues that the circuit court erred in (1) assessing all costs of travel to her, (2) awarding her ex-husband, Shonn Jones, twice-monthly visitation in addition to the proposed visitation schedule, and (3) granting Jones the right to require visitation on only one week's notice. We reverse and remand.

Webster and Jones were married in October 2005 and separated in July 2015. On 4 September 2015, Jones filed a complaint for separate maintenance and requested a hearing on the issues of payment of marital debts, visitation, and support of the parties' two children, five-year-old J.J. and nine-month-old S.J. The complaint also noted that Webster was pregnant with a due date in February 2016.

In January 2016, Jones filed an amended complaint and requested an absolute divorce from Webster. In February 2016, Webster counterclaimed for divorce and requested

custody of the children, including one-month-old P.J. In June 2016, she requested an order of temporary support. The circuit court convened a hearing in September 2016, at which Webster testified that she had not received any child support since the commencement of the case. She testified that she was employed with Advocare as a salesperson, that her income was $843.17 biweekly, and that her total gross income for 2016 was $20,235.91. She also claimed expenses of $3,874.24 a month.

Jones testified that he was an independent contractor for Inferno Mixed Martial Arts and had a gross income of $700 a month. He also said that he had been employed at Northwest Arkansas Storage until 21 September 2016. He testified that he paid $650 a month in rent and that he provided health and dental insurance for himself, Webster, and the children. He also paid for life insurance policies for himself and Webster.

The circuit court denied Webster's request for temporary support, finding "no apparent emergency meriting the award of temporary spousal support or temporary child support." The court also noted "substantial confusion regarding the income and expenses of the parties."

In December 2016, the circuit court granted Jones's complaint for divorce and incorporated into its order a child-custody and property-settlement agreement executed by the parties. Pursuant to that agreement, Webster was awarded primary custody of the children, and Jones was awarded the court's standard schedule of visitation. Jones was also ordered to pay $700 a month for child support.

Six months later, in June 2017, Webster moved to modify visitation. In the motion, she explained that she was engaged to an orthodontist with an established practice in Las

Vegas, Nevada, and that she wished to relocate there with the children. Webster requested an immediate temporary hearing so she could have the children in Las Vegas before school began in August and could plan her wedding that summer to include the children. She indicated that she was willing to pay for the children's travel to and from Arkansas.

The circuit court convened a hearing on 11 July 2017. Webster testified that she wished to move to Las Vegas to be with her fiancé and to work in his orthodontic practice as the manager. She said that it was in the children's best interest to move with her because she is their primary caregiver and she has a strong relationship with them. Webster explained that she had already researched the school that the oldest child would attend and that the two younger children would attend a pre-K school located next to the orthodontic practice. She also stated that she wanted the children's relationship with their father to continue and that "we are prepared to pay for travel so that that burden is not on him." She proposed a visitation schedule and said that if Jones wants to visit any time outside the schedule "he is welcome to come and do so." Under the proposed visitation schedule, Jones would have the children every year for spring break, and the parties would alternate Thanksgiving break, with Jones having odd years and Webster having even years. The parties would also evenly split the Christmas holiday and summer break. The proposed schedule contained no provision for monthly visitation.

Jones testified that he has exercised weekly visitation with his children and that he does everything he can to spend time with them. He also said that the children have close relationships with other family in Arkansas, including other brothers and sisters, and that "there's just so much that they have here that they would be losing if they were to leave."

Jones asked "that this not happen in this manner or that I get granted sufficient visitation with them to continue our relationship for the betterment of the children."

During closing argument, Webster's counsel argued that Jones had failed to rebut the presumption favoring relocation by the custodial parent in *Hollandsworth v. Knyzewski*, 353 Ark. 470, 109 S.W.3d 653 (2003), and reiterated that Webster "is willing to pay for the travel for Mr. Jones to come out there for the children—her to bring the children here." In its oral ruling, the court agreed that *Hollandsworth* controlled and that Jones did not rebut the presumption in favor of allowing relocation. The court's written order, entered on 29 August 2017, granted Webster's petition to relocate and adopted Webster's proposed visitation schedule. The court also ordered the following:

> 3. The Court orders that the Defendant is to pay for the Plaintiff's reasonable cost of airfare, hotel, and rental car, up to two weekends a month, and for any other time the Plaintiff is scheduled to see the children according to the adopted visitation schedule.
>
> 4. The Court orders that the Defendant is to cover the airfare costs of the children when the children fly to Arkansas to see the Plaintiff. . . .
>
> 5. The Plaintiff must give at least one week's notice before traveling to see the children.

Webster filed a timely notice of appeal from this order.

On 10 November 2017, Webster filed a motion pursuant to Ark. R. Civ. P. 60 seeking relief from the judgment. She argued that the circuit court erred in awarding Jones twice-monthly visitation in addition to the proposed visitation schedule, in granting Jones an unqualified right to require visitation on only one week's notice, and in assessing all costs of travel to her. On travel costs, she asserted that because she bears the principal cost of caring for the children, it was unreasonable for her to bear the sole cost of travel as well,

and that the cost unreasonably burdened her right to relocate. She noted that she receives $700 a month in child support but has paid approximately $1,862.84 a month in travel costs since 15 August 2017. She also noted recent financial hardship resulting in her filing for bankruptcy.

Webster also argued that by adding twice-monthly visits, the court's order had upset the balance in the visitation schedule. Alternatively, she also argued that if the monthly visits stand, the notice requirement should be amended to six weeks; otherwise, she asserted, she is under an ongoing "threat of cancelling plans to suit [Jones's] demands." She contended that Jones's invocation of this one-week-notice provision had already negatively impacted her life and the children's lives by preventing the children from participating in her wedding and preventing her from taking the children to visit their grandmother. Webster's Rule 60 motion was summarily denied, and she properly amended her notice of appeal to include the denial of this motion.

On appeal, Webster again argues that the circuit court erred in (1) assessing all costs of travel to her, (2) awarding Jones twice-monthly visitation in addition to the proposed visitation schedule, and (3) granting Jones the right to require visitation on only one week's notice. The same standard of review applicable to the modification of custody applies to the modification of visitation. We consider the evidence de novo. *Baber v. Baber*, 2011 Ark. 40, 378 S.W.3d 699. We will not reverse the circuit court's findings unless they are clearly erroneous. *Id.* A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Hudson v. Hudson*, 2012 Ark. App. 308, 419

S.W.3d 34. Whether the circuit court's findings are clearly erroneous turns largely on the credibility of the witnesses, and we give special deference to the superior position of the circuit court to evaluate the witnesses, their testimony, and the child's best interest. *Baber*, *supra*. The primary consideration regarding visitation is the best interest of the child. *Id*. Important factors the court considers in determining reasonable visitation are the wishes of the child, the capacity of the party desiring visitation to supervise and care for the child, problems of transportation and prior conduct in abusing visitation, the work schedule or stability of the parties, and the relationship with siblings and other relatives. *Id*. Fixing visitation rights is a matter that lies within the sound discretion of the circuit court. *Id*.

Webster first asserts that the majority of Arkansas cases that have addressed the apportionment of travel expenses have equally split those expenses between the parties; only one case, *Rebsamen v. Rebsamen*, 82 Ark. App. 329, 107 S.W.3d 871 (2003), has affirmed an order assigning the custodial parent all costs of travel. In *Rebsamen*, the mother remarried and relocated out of state with the child, and the family's yearly income increased from $48,000 to $82,000. In contrast, the father's yearly income was $35,000. The circuit court found that the mother would be responsible for transportation expenses, and this court affirmed:

> In light of the existing economic differences between the parties, we also find no clear error in the trial court's determination that, on the whole, appellant should be responsible for the transportation cost of visitation, except in such cases where appellee's specific family needs might require additional visitation not specifically ordered. After all, it was appellant who requested the relocation in the first place, and she does not appear to challenge the financial aspects of the order.

82 Ark. App. at 338, 107 S.W.3d at 876.

Webster argues that *Rebsamen* is distinguishable because here, Jones is in the superior economic position. She asserts that according to the documents in the record, she earns $10,487.88 a year, while Jones earns $23,400 a year. Webster further distinguishes *Rebsamen* by arguing that *Rebsamen* predates *Hollandsworth*, and because *Hollandsworth* established a presumption in favor of relocation, the fact that she requested the move is obsolete. Webster contends that the circuit court's order is so financially crippling (approximately $1800 a month) that it amounts to a denial of relocation. Finally, Webster asserts that clarity is needed on this issue and asks this court to adopt a rebuttable presumption that parents should equally share costs of travel following relocation.

Jones responds that *Rebsamen* is not distinguishable and that the circuit court "recognized the far superior income assets and resources" of Webster compared to Jones. He argues that this court should defer to the circuit court's credibility determination in disbelieving that Webster's income would be $873.99 per month "while working for her husband, a prominent orthodontist in Las Vegas, Nevada[.]" Jones contends that Webster was clearly "marrying into a lot of money and assets" and therefore has the ability to pay the full expenses of Jones's travel. Webster replies that her husband's income is not a proper consideration because there is no evidence of his income in the record, he and Webster did not marry until after the circuit court's order had been entered, and he and Webster "entered into a premarital agreement which absolves him of all costs relating to her children."

Next, Webster argues that the circuit court clearly erred in adding twice-monthly visitation to the proposed visitation schedule because the parties' incomes are not sufficient to support this additional cost, particularly in light of technological alternatives to in-person

visitation such as Skype and FaceTime. She asserts that the court's order effectively diverts income to the Las Vegas tourism industry that could be used to benefit the children. She also contends that having the children live in a Las Vegas hotel two weekends a month is not in their best interest. Webster argues that instead of ordering costly twice-a-month in-person visitation, the circuit court should have recognized the available technological alternatives that provide adequate means for Jones and the children to maintain a meaningful relationship.

Jones responds by again asserting that Webster can easily afford to pay the travel expenses and that allowing him in-person visitation twice a month is in the best interest of the children. Jones denies that technological alternatives like Skype are acceptable and disagrees with Webster's assertion that the children would be spending two weekends a month in a hotel room. In reply, Webster argues that Skype is a recognized tool for facilitating face-to-face communications between children and their noncustodial parent. She suggests that we modify the circuit court's order to include weekly face-to-face telecommunication, to strike the twice-monthly in-person visitation, and to keep the extended in-person visitations as listed in the proposed schedule adopted by the court. Alternatively, she asks that the parties be ordered to split all travel costs from the twice-monthly visitations.

Third, Webster maintains that requiring Jones to give only one week's notice of any intended visitation gives Jones a "unilateral right to ambush [Webster's] plans" with the children. Webster cites two instances in which this has already occurred: (1) Jones exercised visitation the weekend of her wedding, preventing the children from participating; and (2)

Jones exercised visitation on Labor Day weekend, preventing the children from going on a planned trip to Utah to visit their great-grandmother. She asserts that the one-week-notice requirement is not in the best interest of the children because it causes instability in their home life and causes infighting between the parties about costs of travel and timing of visitation. In response, Jones contends that one week's notice is adequate and states, "If the Appellee can find the time and effort to board a plane and travel cross-country to Appellant's town the least Appellant can do is make the children available for visitation."

We agree that the circuit court's order as it currently stands allows too much uncertainty and instability in the children's lives. We also hold that the record does not demonstrate the sort of economic disparity present in *Rebsamen* to justify the assignment of all travel costs to the custodial parent, particularly under the current visitation schedule. In our de novo review, we conclude that the order modifying visitation is clearly erroneous. Accordingly, we reverse and remand on all points for the circuit court to devise a visitation arrangement in accordance with the children's best interest.

Reversed and remanded.

HIXSON and MURPHY, JJ., agree.

Pinnacle Law Group, by: *Matthew A. Kezhaya*, for appellant.

Freeman Law Firm, PLC, by: *Mark J. Freeman*, for appellee.